

*United States Court of Appeals
for the Second Circuit*



AMICUS BRIEF

Affidavit

75-7696

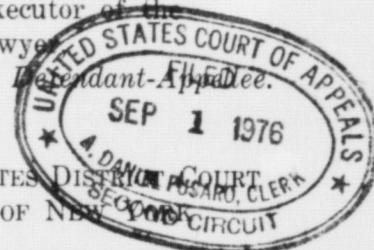
To be argued by
FREDERICK P. SCHAFFER

United States Court of Appeals **B**
FOR THE SECOND CIRCUIT

Docket No. 75-7696

KURT SCHMIEDER,
Plaintiff-Appellant,
—against—

LOUIS H. HALL, Jr., as Executor of the
Estate of Helen B. Dwyer



ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

SUGGESTION OF INTEREST ON BEHALF OF THE
UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
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4



TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Basis for the United States' Interest	2
 ARGUMENT:	
The District Court correctly held that the vesting order extinguished any interest Schmieder may have had in the property seized from Mrs. Dwyer	2
CONCLUSION	6

TABLE OF CASES

<i>Balkan Nat'l Insurance Co. v. Commissioner</i> , 101 F.2d 75 (2d Cir. 1939)	3
<i>Bank voor Handel en Scheepvaart, N.V. v. Kennedy</i> , 288 F.2d 375 (D.C. Cir.), cert. denied, 366 U.S. 962 (1961)	2
<i>Cummings v. Deutsche Bank</i> , 300 U.S. 115 (1937)	3
<i>Geo. Nicha's & Co. v. United States</i> , 153 F. Supp. (Ct. Cl. 1957)	5
<i>In re Hogemann's Estate</i> , 403 P. 2d 405, 45 Cal. Rptr. 149 (1965)	6
<i>International Products Corp. v. Koons</i> , 325 F.2d 403 (2d Cir. 1963)	1
<i>Junkers v. Chemical Foundation, Inc.</i> , 287 Fed. 597 (S.D.N.Y. 1922)	3
<i>Munich Reinsurance Co. v. First Reinsurance Co.</i> , 6 F.2d 742 (2d Cir. 1925), appeal dismissed, 273 U.S. 666 (1927)	3

	PAGE
<i>Mutzenbecher v. Ballard</i> , 16 F.2d 173 (S.D.N.Y.), aff'd, 16 F.2d 174 (2d Cir. 1926), cert. denied, 273 U.S. 766 (1926)	3
<i>Northern Trust Co. v. Biddle</i> , 212 N.E. 2d 694, 65 Ill. App. 2d 253 (1965), cert. denied, 385 U.S. 828 (1966)	6
<i>Societe Suisse v. Cummings</i> , 99 F.2d 387 (D.C. Cir. 1938), cert. denied sub nom. <i>Society Suisse v. Murphy</i> , 306 U.S. 631 (1939)	3
<i>Stoehr v. Wallace</i> , 255 U.S. 239 (1921)	2
<i>Swiss Ins. Co. v. Miller</i> , 267 U.S. 42 (1925)	2
<i>United States v. Borax Control</i> , 62 F. Supp. 220 (N.D. Cal. 1945)	3
<i>United States v. Silliman</i> , 65 F. Supp. 665 (D.N.J.), rev'd on other grounds, 167 F.2d 607 (3rd Cir.), cert. denied, 335 U.S. 825 (1948)	3
 <i>Statutes:</i>	
Trading with the Enemy Act:	
50 U.S.C. App. §§ 1, <i>et seq.</i>	2
50 U.S.C. App. § 5(b)	3
50 U.S.C. App. § 12	3
50 U.S.C. § 39	4
50 U.S.C. App. § 41	5

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Defendant-Appellee.

SUGGESTION OF INTEREST ON BEHALF OF THE
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Preliminary Statement

Title 28, United States Code, Section 517 authorizes the Attorney General to send any officer of the Department of Justice "to attend to the interest of the United States in a suit pending in a court of the United States." See *International Products Corp. v. Koons*, 325 F.2d 403, 408-09 (2d Cir. 1963). Pursuant to that authority and the direction of the Attorney General, the United States Attorney for the Southern District of New York appeared and filed a suggestion of interest on behalf of the United States of America in this case before the District Court on March 11, 1975. (764a-81a). For the reasons set forth below, the United States renews that suggestion of interest and submits that the judgment below entered on October 6, 1975 dismissing the complaint should be affirmed.

Basis for the United States' Interest

This case draws into issue the effect of a vesting order issued under the Trading with the Enemy Act, 50 U.S.C. App. §§ 1, *et seq.*, upon property in which plaintiff Schmieder, who was an enemy national at the time of the vesting,* now asserts an interest. This issue transcends the interests of the parties to this action and affects the administration of the Trading with the Enemy Act and the implementation of the policies embodied therein. For this reason the United States submits this suggestion of interest so that its views may be formally made of record.

ARGUMENT

The District Court correctly held that the vesting order extinguished any interest Schmieder may have had in the property seized from Mrs. Dwyer.

The Trading with the Enemy Act, 50 U.S.C. App. §§ 1, *et seq.*, is a war-time measure authorized by "the constitutional provision, Art I, § 8, cl. 11, empowering Congress 'to declare war, grant letters of marque and reprisal and make rules concerning captures on land and water.'" *Stoehr v. Wallace*, 255 U.S. 239, 242 (1921). Pursuant to this broad power, the Act provides that with respect to seized property, the Alien Property Custodian may "exercise any rights or power which may be or become

* Schmieder's suggestion that he is now an alien friend and therefore free of the effects of the vesting order is totally unfounded. The courts have uniformly held that enemy status, once acquired, does not terminate when the war ends or when a person who is an enemy by reason of residence in enemy territory moves to a neutral or friendly country. See, e.g., *Swiss Ins. Co. v. Miller*, 267 U.S. 42, 45 (1925); *Bank voor Handel en Scheepvaart, N.V. v. Kennedy*, 288 F.2d 375 (D.C. Cir., cert. denied, 366 U.S. 962 (1961).

appurtenant thereto or to the ownership thereof in like manner as though he were the absolute owner thereof." 50 U.S.C. App. § 12. Thus, the Supreme Court has unequivocally held that "the taking left in enemy owners no beneficial right to, or interest in, the property." *Cummings v. Deutsche Bank*, 300 U.S. 115, 121 (1937). See also *Balkan Nat'l Insurance Co. v. Commissioner*, 101 F.2d 75, 77 (2d Cir. 1939); *Societe Suisse v. Cummings*, 99 F.2d 387, 395 (D.C. Cir. 1938), cert. denied *sub nom. Society Suisse v. Murphy*, 306 U.S. 631 (1939); *United States v. Silliman*, 65 F. Supp. 665, 673 (D.N.J.), rev'd on other grounds, 167 F.2d 607 (3rd Cir.), cert. denied, 335 U.S. 825 (1948); *United States v. Borax Control*, 62 F. Supp. 220, 222-223 (N.D. Cal. 1945). It therefore follows that the divested alien has no rights against a subsequent transferee from the United States of the seized property. *Munich Reinsurance Co. v. First Reinsurance Co.*, 6 F.2d 742 (2d Cir. 1925), appeal dismissed, 273 U.S. 666 (1927); *Mutzenbecher v. Ballard*, 16 F.2d 173 (S.D.N.Y.), aff'd, 16 F.2d 174 (2d Cir. 1926), cert. denied, 273 U.S. 766 (1926); *Junkers v. Chemical Foundation, Inc.*, 287 Fed. 597 (S.D.N.Y. 1922).

On the basis of the foregoing authority, the District Court was correct in holding that any interest which Schmieder may have had in the property conveyed to Mrs. Dwyer was totally extinguished by the vesting order, and that Schmieder therefore has no right to pursue his action against Mrs. Dwyer for return of the vested property. The fact that Mrs. Dwyer received back a portion of the vested property in settlement of her claim rather than as a purchaser does not in any way indicate a different result. The Act provides that seized property "shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States." 50 U.S.C. App. § 5(b). Those interests, as well as the clear provisions of the Act, require that the Alien Property Custodian have the author-

ity to settle claims to vested property by persons other than enemy aliens, as well as to sell such property, free and clear of later claims by enemy aliens of interests in that property. This is especially so in a case such as this one where, as the District Court concluded, "since the claim that the government settled when it reconveyed certain property back to Mrs. Dwyer was a claim that Schmieder retained some beneficial interest in the property, it seems apparent that the very interest Schmieder asserts in this action is the one which was subject to the vesting order and ultimately disposed of in its settlement with Mrs. Dwyer." (885a-86a).

Schmieder argues rather disingenuously that since the settlement stipulation provides for the dismissal of Mrs. Dwyer's action with prejudice, it somehow involves the rejection of her claim of title. This is obviously nonsense. The dismissal of Mrs. Dwyer's action was necessary to prevent any further claims by her once the settlement was consummated. To the extent that the settlement provided for the return of a portion of the property to Mrs. Dwyer, it recognized the validity of her claim of title and thus the absence of any interest of Schmieder in the property which is the subject of this action. In any event, whatever interest Schmieder may have had was cut off by the vesting order, and nothing contained in the settlement argument between Mrs. Dwyer and the United States could or did restore that interest. Indeed, the trading with the Enemy Act specifically provides that "[n]o property or interest therein of Germany, or Japan, or any national of either such country vested in or transferred to any officer of agency of the Government at any time after December 17, 1941 pursuant to the provisions of this Act, shall be returned to former owners thereof or their successors in interest. . ." 50 U.S.C. § 39.

Nor is there any merit to Schmieder's contention that the vesting order was ineffective as to Schmieder's equitable interest because at that time he had not yet exercised his alleged right to elect a constructive trust. As the District Court said with respect to an almost identical argument below:

This argument, however, ignores the fact that whatever equitable interests Schmieder had in the property arose on the day in 1938 when it was transferred to Mrs. Dwyer. While his failure to discover the fraud until the 1960's would affect the running of the statute of limitations, it could in no way alter the fact that his interest in the property pre-dated the vesting order. And, as noted above, whatever that interest was, it was totally extinguished by the seizure of the property by the Alien Property Custodian. (889a).

It is thus absurd for Schmieder to suggest that the vesting order was illegal.* While the vesting order did cut off Schmieder's alleged equitable interest in the seized property, there is little merit to his argument that the "federal common law" was thereby violated, for that is precisely the result which a vesting order is intended to achieve.

Similarly unfounded is Schmieder's claim that his interest in the subject property was "divested" pursuant to 50 U.S.C. App. § 41. That section provides in pertinent part that "all rights and interests of individuals in . . . trusts . . . vested under this Act after December 31, 1961, which have not become payable or deliverable to or have

* This is not a case like *Geo. Nichaus & Co. v. United States*, 153 F. Supp. (Ct. Cl. 1957) where the vesting order was outside of the Attorney General's authority under the statute and applicable regulations.

not vested in possession in the Attorney General prior to December 31, 1961 are divested." Even if the District Court had not been correct in finding that Schmieder had failed to sustain his burden of proving that he had any interest in the subject property or that it was subject to a trust, the simple fact remains that Schmieder's alleged interest was a present, enforceable interest from the time of the transfer of the property to Mrs. Dwyer. Thus, the property clearly became payable or deliverable to and, in fact, vested in possession of the Attorney General at the time of the vesting order in 1948, long before the December 31, 1961 divestiture date. See *Northern Trust Co. v. Biddle*, 212 N.E. 2d 694, 65 Ill. App. 2d 253 (1965), cert. denied, 385 U.S. 828 (1966); *In re Hogemann's Estate*, 403 P. 2d 405, 45 Cal. Rptr. 149 (1965).

In sum, the District Court correctly held that Schmieder lacked standing to maintain this action and its judgment should be affirmed.

CONCLUSION

For the foregoing reasons, the judgment of the District Court dismissing the complaint herein should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.

FREDERICK P. SCHAFFER,
Assistant United States Attorney,
Of Counsel.

AFFIDAVIT OF MAILING

State of New York }
County of New York }

Marian J. Bryant being duly sworn,
deposes and says that she is employed in the Office of the
United States Attorney for the Southern District of New York.

That on the

26th day of August, 1976 she served a copy of the
within Suggestion of Interest on Behalf of the United States of
America

by placing the same in a properly postpaid franked envelope addressed:

Werner Galleski, Esquire
450 Park Avenue
New York, New York

Berg and Duffy
3000 Marcus Avenue
Lake Success, New York 11040

Turchin and Topper
60 East 42nd Street
New York, New York 10017

Martin, Obermaier & Morville
1290 Avenue of the Americas
New York, New York 10018

And deponent further
says she sealed the said envelopes and placed the same in the
mail chute drop for mailing in the United States Courthouse Annex,
One St. Andrews Plaza, Borough of Manhattan, City of New York.

Sworn to before me this

Maria L. Bryant

26th day of August, 19 76

Lawrence Mason

LAWRENCE MASON
Notary Public, State of New York
No. 03-2572560
Qualified in Bronx County
Commission Expires March 30, 1977